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VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Ex Parte* Communication of the American Cable Association; Petition of Charter Communications, Inc., for a Determination of Effective Competition, MB Docket No. 18-283; CSR No. 8965-E

Dear Ms. Dortch:

The American Cable Association (“ACA”) hereby submits this *ex parte* letter in the above-captioned proceeding regarding Charter Communications, Inc.’s Petition for Determination of Effective Competition (“Petition”).¹ In the Petition, Charter seeks a determination that, under the Local Exchange Carrier (“LEC”) Test, it faces effective competition in certain franchise areas that are currently subject to rate regulation because of DIRECTV NOW’s availability in those areas. ACA agrees with Charter that DIRECTV NOW meets the requirements of the LEC Test and thus Charter’s petition should be granted.

The LEC Test derives from Section 623(l)(1)(D) of the Communications Act, which defines “effective competition” as, among other things:

a local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate) [that] offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.²

¹ *Petition of Charter Commc’ns, Inc. for a Determination of Effective Competition*, MB Docket No. 18-283 (2018) (“Petition”).

² 47 U.S.C. § 543(l)(1)(D).

The key question in Charter's Petition is whether the availability of DIRECTV NOW in a franchise area is sufficient for a cable operator to meet the LEC Test. The answer is yes. DIRECTV NOW falls squarely within the LEC Test's definition, as it is an affiliate of AT&T, a local exchange carrier, and it offers to consumers a video programming service comparable to that provided by cable operators such as Charter. Moreover, where broadband Internet access service is available throughout a franchise area, as it is in the franchise areas at issue in this Petition,³ there are no regulatory, technical, or other impediments to consumers accessing DIRECTV NOW, and DIRECTV NOW's own marketing campaigns have ensured that consumers are "reasonably aware" of the service.⁴

ACA agrees with Charter that the text of the LEC Test does not require that the LEC itself offer local exchange service within the franchise area,⁵ nor must DIRECTV NOW meet the definition of MVPD to satisfy the test.⁶ The statutory text requires only that DIRECTV NOW be an affiliate of a LEC (which it is) and that it offer video programming services directly to subscribers in the franchise area (which it does). Moreover, granting Charter's Petition is consistent with Congress's clearly stated intention that rate regulation be used only as a last resort where no comparable alternatives are available.⁷

DIRECTV NOW is a substitute for traditional pay-TV services. Not only does it meet the Commission's definition of a "comparable" video programming service,⁸ it has clearly positioned itself in the market as a substitute for cable and DBS, using ad campaigns that specifically encourage viewers to reject traditional pay-TV service and replace it with DIRECTV NOW.⁹ Industry observers have also noted that DIRECTV NOW is designed to serve as a replacement for traditional pay-TV service.¹⁰

³ Petition at 9 ("With broadband available to virtually 100 percent of Charter's customers in the Franchise Areas, AT&T is physically able to deliver service to any current Charter-served household that wishes to subscribe.").

⁴ See *id.* at 8-11.

⁵ See *id.* at 13-16.

⁶ See *id.* at 16-18.

⁷ *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation*, Report and Order, 8 FCC Rcd 5631, ¶ 2 (1993) ("The Cable Act of 1992 generally provides that where competition is present, cable television rates shall not be subject to regulation by government but shall be regulated by the market. The Act contains a clear and explicit preference for competitive resolution of issues where that is feasible.").

⁸ See Petition at 11-12.

⁹ Jeff Baumgartner, *AT&T Kicks Off DirecTV Now Ad Campaign*, MULTICHANNEL NEWS (Jul. 24, 2017), <https://www.multichannel.com/blog/att-kicks-directv-now-ad-campaign-414170>. In one ad, entitled "Free," actor Michael B. Jordan states, "We want TV without all that old TV stuff. We want live TV that's annual contract free, hardware free, commitment free, even couch-free...walls-free...pants free." The statement implies that DIRECTV NOW provides a viewing experience that is identical to that of traditional pay-TV, except without certain unwanted characteristics that are common to traditional pay-TV service (e.g., set-top boxes and annual contracts). In another ad, entitled "Cable B. Ware," the same actor is shown lighting a fuse attached to a cable set-top box, explaining to another actor, just before the box explodes, that it is no longer needed to watch TV. Again, the implication is that, with DIRECTV NOW, a viewer can enjoy the same viewing experience without a set-top box. See also DIRECTV NOW TV Commercial, 'More for Your Thing: Break Up' Song by Lizzo, available at <https://www.ispot.tv/ad/w3wn/directv-now-your-thing-break-up-song-by-lizzo> (last visited Nov. 19, 2018).

¹⁰ See, e.g., Aaron Pressman, *A Cord Cutter's Life for Me: Replacing Cable with Internet TV*, FORTUNE (Apr. 12, 2018), <http://fortune.com/2018/04/12/a-cord-cutters-life-for-me-replacing-cable-with-internet-tv/>; see also Kris Wouk, *DirecTV Now: Everything you need to know*, DIGITAL TRENDS (Sept. 19, 2018),

Perhaps most importantly, viewers themselves are demonstrating that they view DIRECTV NOW as a substitute for traditional pay-TV services, as the cord-cutting trend continues.¹¹ Not every cord-cutter chooses to subscribe to DIRECTV NOW, but many do. Since the launch of DIRECTV NOW in late 2016, traditional pay-TV services have lost many millions of subscribers,¹² while DIRECTV NOW added nearly 2 million subscribers.¹³

ACA members have a strong interest in the Commission's ruling on the Charter Petition. While right now there are only a few franchise areas that are not subject to effective competition through the Competing Provider Effective Competition Test (including the ones that are the subject of this petition),¹⁴ the video programming market continues to evolve. The market for traditional, facilities-based video programming services – both cable and DBS – has contracted, as more and more subscribers cut the cord and look to alternatives. In 2018 alone cable and satellite providers lost a combined total of 2.8 million subscribers,¹⁵ with satellite providers losing subscribers faster than cable.¹⁶ If trends continue, traditional competitors' penetration rates may, in the future, drop below the 15-percent threshold necessary for a finding of effective competition. If that should happen, cable providers throughout the country could

<https://www.digitaltrends.com/home-theater/what-is-directv-now/> (noting that “where some competitors aim to offer services that differentiate from cable or satellite, DirecTV Now very much aims to replace your cable or satellite subscription,” and that DIRECTV NOW duplicates the traditional TV experience by offering “a ton of channels and a very similar interface, complete with the sort of programming guide you’d see on your cable box.”).

¹¹ Drew FitzGerald and Benjamin Mullin, *Outlook for Traditional TV Goes From Bad to Worse*, THE WALL STREET JOURNAL (Nov. 19, 2018), <https://www.wsj.com/articles/outlook-for-traditional-tv-goes-from-bad-to-worse-1542632401> (subscription required).

¹² S&P Global Market Intelligence, U.S. Multichannel Industry Benchmarks, <https://platform.mi.spglobal.com/web/client?auth=inherit&newdomainredirect=1&#industry/multichannelIndustryBenchmarks> (subscription required).

¹³ Ian Olgeirson, Tony Lenoir and Neil Barbour, *Q3'18 multichannel video subscriptions fall despite virtual services lift*, KAGAN (Nov. 12, 2018), <https://platform.mi.spglobal.com/web/client?auth=inherit&newdomainredirect=1&#news/article?id=47764955&KeyProductLinkType=6> (subscription required).

¹⁴ In 2015, the Commission adopted a rebuttable presumption that all cable systems are subject to effective competition, relying on the Section 623(l)(1)(b) of the Act (the “Competing Provider Effective Competition Test”). Under the Competing Provider Effective Competition Test, a franchise area is considered subject to effective competition if: i) there are at least two unaffiliated multichannel video service providers (“MVPDs”) providing service to at least 50 percent of households in the area; and ii) the number of households actually subscribing to the an MVPD other than the largest exceeds 15 percent of the market in that area. 47 U.S.C. § 543(l)(1)(B). Recognizing that DBS providers DIRECTV and DISH Network are available to nearly all homes in the US and that their combined nationwide penetration was nearly double the 15 percent necessary to satisfy the Competing Provider Effective Competition Test, the Commission adopted a rebuttable presumption of effective competition nationwide. *Amendment to the Commission's Rules Concerning Effective Competition*, 30 FCC Rcd 6574, ¶¶ 8-9 (2015).

¹⁵ Mike Snider, *Cord cutting accelerates even worse than first thought, with 1.2 million defections in Q3*, USA TODAY (Nov. 14, 2018), <https://www.usatoday.com/story/tech/nation-now/2018/11/14/cord-cutting-pace-accelerates-1-2-million-drop-pay-tv-3rd-quarter/1997716002/>.

¹⁶ Joseph O'Halloran, *Falling satellite sector drives unprecedented losses for US pay-TV in Q3 2018*, RAPID TV NEWS (Nov. 14, 2018), <https://www.rapidtvnews.com/2018111354149/falling-satellite-sector-drives-unprecedented-losses-for-us-pay-tv-in-q3-2018.html#ixzz5XJJBcRAO>.

suddenly be faced with the prospect of rate regulation once again, *despite increased competition* from DIRECTV NOW.

In the Commission's proceeding on *Restoring Internet Freedom*, ACA described how uncertainty and the threat of future rate regulation had depressed small providers' investments in their networks.¹⁷ The same dynamics are in play in this context. As marketplace changes make it more likely that local franchising authorities could overcome the existing presumption of effective competition due to decreased satellite TV subscribership, small cable operators will likely reduce their investment in video services. Granting Charter's petition will give cable operators, particularly smaller cable operators who would be disproportionately impacted by increased risks, comfort that, if penetration from competing traditional pay-TV providers in their franchising areas drops below 15 percent, they will still have the opportunity to demonstrate that they are subject to effective competition from comparable LEC-affiliated services, like DIRECTV NOW. This will allow smaller, risk-averse providers to continue to invest in their networks and services without the looming overhang of future rate regulation.

This letter is being filed electronically pursuant to section 1.1206 of the Commission's rules.

Sincerely,

A handwritten signature in cursive script, appearing to read "Mary C. Lovejoy".

Mary C. Lovejoy

¹⁷ See *Restoring Internet Freedom*, WC Docket No. 17-108, Comments of the American Cable Association at 23-28 (filed July 17, 2017) (describing how the threat of future rate regulation that accompanied the reclassification broadband Internet access as a Title II telecommunications services was a key driver in small providers' decisions to cut back or delay network upgrades and expansions).